Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JANICE BRAKKEN,
Petitioner,

v.

STEVEN HOYME,
Respondent.

On Petition For Writ Of Certiorari
To Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an "anti-harassment" injunction directed to petitioner was over-broad and unduly restrictive of her rights to liberty and freedom of speech and association, when it prohibited petitioner not only from certain modes of contacting respondent, but also extended to her contacting him "in any way whatsoever."

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OPINIONS BELOW

The judgment sought to be reviewed is the decision of the Wisconsin Supreme Court on a vote of 3-3, with Justice Sykes not participating) affirming an unpublished decision of the Court of Appeals of Wisconsin, entered 22 July 2003. 2004 WI 26

BASIS FOR JURISDICTION

Jurisdiction in this Court is based upon 28 U.S.C. §1257(a), in that the petition seeks to review the application of Wisconsin law governing issuance of certain injunctions, which Ms. Brakken contends is repugnant to the Constitution of the United States. The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. The First Article of Amendment to the Constitution of the United States provides that:

> Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fourteenth Article of Amendment to the Constitution of the United States provides that

....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

3. Wisconsin Statutes §813.125(4)(a) - (c) (2001-2002):

INJUNCTION. (a) A judge or circuit court commissioner may issue a temporary restraining order ordering the respondent to cease or avoid the harassment of another person, to avoid the petitioner's residence...or any premises temporarily occupied by the petitioner or both, or any combination of these remedies requested in the petition, if all of the following occur....

(b) The injunction may be entered only against the respondent named in the petition.

(c) An injunction under this subsection is effective according to its terms, but for not more than 2 years.

STATEMENT OF THE CASE

In 1998 and 1999, Janice Brakken and Steven Hoyme, Petitioner and Respondent respectively, were involved romantically. By Fall 1999, Hoyme ended the relationship. Brakken, unhappy with Hoyme's decision, tried repeatedly to contact him. In a 12 November 1999 letter Hoyme asked Brakken to stop contacting him. Hoyme's attorney sent a similar letter on 6 January 2000, asking Brakken to stop contacting Hoyme or his family.

On 21 August 2000 Hoyme filed a Petition in Marinette County (Wisconsin) Court, seeking a Temporary Restraining Order and/or Injunction (Harassment) to prevent any future contacts with Brakken. After a hearing, Marinette Wisconsin Court Commissioner Francis Boyle granted a harassment injunction against Brakken on 29 August 2000. Pet. App. 14a. The injunction provided, among other things, that Petitioner was enjoined from "contacting [Hoyme]...[in] any way whatsoever." *Id.*

Brakken, initially appearing *pro se*, attempted to appeal the injunction to the Court of Appeals of Wisconsin. The court of appeals declined review based on a lack of jurisdiction. Thereafter, Brakken retained counsel and requested a *de novo* hearing from the Marinette County Circuit Court. Hoyme objected, and Brakken's attorney, Richard Auerbach, filed a response. Among other things, Brakken's response to the objection argued that the injunction was *ultra vires*. Pet. App.

18a.

On a 23 February 2001 hearing on the request, Attorney Auerbach again asserted that a court commissioner has no authority to issue so broadly restrictive an injunction. Pet. App. 21a. Holding that discussion over for the *de novo* hearing, the trial court granted the *de novo* hearing on the injunction and scheduled it for 12 April 2001. *Id.* The evening before the *de novo* hearing, counsel for both parties discussed a settlement. The day of the *de novo* hearing, the attorneys for the parties appeared alone.

Counsel informed the court that they had reached an agreement whereby Brakken waived the *de novo* hearing and the injunction was to continue with one modification, that Brakken could send one letter to Hoyme without violating the injunction. The court asked if the stipulation would be entered in writing. Auerbach informed the court that he had authority to enter an agreement on behalf of Brakken, but that a writing evidencing the agreement was best. The court made the agreement effective as of that date and asked for a written stipulation and order.

Following the April hearing, counsel for Hoyme sent a stipulation and order to Auerbach for Brakken's review and signature. Brakken did not sign the stipulation as it did not conform to her understanding of the terms of the agreement she had discussed with Auerbach the night before the hearing. Auerbach did not notify the court of Brakken's objections.

On 1May 2001, Hoyme's attorney filed a motion for entry of judgment and sent a proposed order to the court, as well as

serving the documents on Auerbach. Without objection, the court signed the order on 15 May 2001. Pet. App. 16a.

Brakken, again appearing *pro se*, filed a motion for relief with the circuit court. She asserted, among other things, that the injunction had used unconstitutionally overbroad language and enjoined more than just the alleged harassing conduct. *See* Pet. App. 24a. In a letter ruling, dated 31 October 2001, the trial court disposed of most of Brakken's claims, save her motion for relief under § 806.07(1), Wis. Stats., provided she could make the required showing under that statute (namely such things as mistake, excusable neglect, newly-discovered evidence, fraud, misrepresentation, or any other reasons justifying relief.) Pet. App. 27a. Brakken did not make the required showing and her motion was denied by the circuit court on 8 April 2002. Pet. App. 30a. The court also found Brakken's motion was frivolous and awarded Hoyme actual attorneys' fees. *Id.*

Brakken moved for reconsideration, which was denied by the court on 24 July 2002. *See* Pet. App. 33a. Brakken then appealed the 5 April 2002 decision to the Court of Appeals of Wisconsin. In an opinion dated 22 July 2003, the court of appeals did not consider whether the injunction was overbroad because it held she failed to adequately develop how her argument was relevant to the circuit court's review under Wis. Stat. § 806.07(1). *Hoyme v. Brakken*, 2003 WI App 188, ¶14, 266 Wis. 2d 1060, 668 N.W.2d 562. The court of appeals further stated that Brakken's complaint that the injunction was overbroad exceeded its scope of review because the injunction was an order of the court commissioner and not that of the

circuit court. *Id.* ¶16[2]. The court of appeals further found that Brakken's appeal was frivolous and assessed Hoyme's appellate legal fees against her.

Brakken sought review of the court of appeals decision by the Wisconsin Supreme Court. *Hoyme v. Brakken*, 2004 WI 1, 268 Wis. 2d 132, 673 N.W.2d 691. The supreme court was divided equally and consequently affirmed the court of appeals decision. *Hoyme v. Brakken*, 2004 WI 26, 270 Wis. 2d 55, 677 N.W.2d 233.

REASONS FOR GRANTING THE WRIT

AN "ANTI-HARASSMENT" INJUNCTION DIRECTED TO PETITIONER WAS OVER-BROAD AND UNDULY RESTRICTIVE OF HER RIGHTS TO LIBERTY AND FREEDOM OF SPEECH AND ASSOCIATION, WHEN IT PROHIBITED PETITIONER NOT ONLY FROM CERTAIN MODES OF CONTACTING RESPONDENT, BUT ALSO EXTENDED TO HER CONTACTING HIM "IN ANY WAY WHATSOEVER" [3]

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[2]. The Court of Appeals apparently ignored the trial judge's Order of 15 May 2001 continuing the Court Commissioner's Order "in full force and effect," with the one specified exception. Pet. App. 17a.

[3] The injunction, which prohibited "contacting [Dr. Hoyme] by any means whatsoever" even through attorneys, is broader than the Wisconsin statute permits. Sec. 813.125(4)(a), Wis. Stats. permits only an Injunction "ordering the respondent to cease or avoid the harassment of another person, to avoid the petitioner's residence...or any combination of these remedies requested in the petition.... The trial court apparently entered an Injunction

In Marinette County, Wisconsin, apparently the authority to issue anti-harassment injunctions is granted to court commissioners. An aggrieved respondent may request a hearing *de novo* before an elected judge. The court commissioner granted Dr. Hoyme an injunction which prohibited Ms. Brakken from:

> [c]ontacting Petitioner [Dr. Hoyme] by telephone, letter, fax, telegram, computer, in person, through a third party, or any way whatsoever; entering upon any property owned, leased or rented by Petitioner, from which Petitioner conducts his business or at which Petitioner resides, whether temporarily or more permanently. Respondent may not come into contact with Petitioner in any public place. If either Respondent or Petitioner arrives at a public place and discovers that the other is present, the last to arrive must leave immediately."

Pet. App. 14a-15a.

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pursuant to a statute which the Respondent herein had not invoked nor had the court mentioned: Sec. 813.12(4), Wis. Stats., Domestic abuse restraining orders and injunctions. Even this latter statute permits contact through counsel. *Id.* While it seems to counsel that restricting a person's liberty by an injunction not permitted by State law is a *per se* denial of due process of law, this question was not raised in this form below, and could only be reached by the plain error doctrine.

At a hearing on Ms. Brakken's request for a *de novo* consideration of the original anti-harassment petition, counsel seem to have stipulated that the Order could continue in force, subject only to the modification that Ms. Brakken could write one letter to Dr. Hoyme. Ms. Brakken has consistently contended that she never authorized her then attorney to enter into such an agreement. In any event, she did write a letter to Dr. Hoyme.

Both Wisconsin and federal appellate courts have been cautious about approving injunctions which too broadly limit a person's fundamental rights of freedom of speech and association. *See, e.g., Bachowski v. Salamone*, 139 Wis. 2d 397, 412-414; 407 N.W.2d 533 (1987). *See also, e.g., Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 2003 U.S. App. Lexis 24295 (4th Cir. 2003) (some rights of expression may be limited, but within constitutional safeguards). Indeed, the *Newsom* court cited with approval the assertion in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), that undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression (citing *Tinker* at 508). It is only when there is a *specific* fear of disturbance that speech (in this instance the somewhat limited rights of school children) may be restricted. In any event, while speech may sometimes be restricted, an enactment that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.... is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose" of the enactment. *Reno v. ACLU*, 521 U.S. 844 , 874 (1997).

In the present case, had the trial court even limited itself to the powers granted it by the applicable statute, *i.e.* no harassment (which is defined earlier in the statute) and no bothering Dr. Hoyme at his residence, it would at least arguably be enough restricted as to fall within constitutional boundaries. But not only did the trial court issue an injunction patently *ultra vires*, it also failed to circumscribe the scope of its prohibition to the more restricted alternatives available: those clearly authorized by the applicable statute, for one, or permitting contact through counsel (as some other Wisconsin injunction statutes permit–e.g. the anti-domestic abuse statute at § 813.12, Wis. Stats.), or permitting contact with some legitimate purpose.

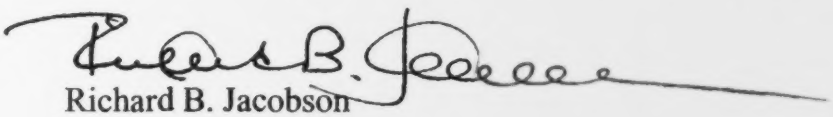
It is clear that the trial court had to consider not only Ms. Brakken's rights of free speech and association, but also those of the unwilling and aggrieved Dr. Hoyme. "The unwilling listener's interest in avoiding unwanted communication" is respected in numerous decisions. *Ashcroft v. ACLU*, _____ U.S. _____, n. 24, 124 S. Ct. 2783, 2004 US LEXIS 4762 (2004). This protection is strongest in and near the home, *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970); *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); it can, however, also apply in "confrontational settings." *Ashcroft*, ____ U.S. at ___ ____. The constitutional infirmity in the injunction here challenged is that it restricted its consideration almost entirely to the interests of Dr. Hoyme in being left alone, and gave almost no thought to the liberties of Ms. Brakken which it restricted by its extraordinary overbreadth. While Ms. Brakken was not at liberty to harass Dr. Hoyme, her freedom to contact him, directly or through counsel, for other and legitimate purposes, was derogated, beyond the authority of the court.

CONCLUSION

A writ of certiorari should be granted because the challenged injunction is contrary to the Constitution of the United States.

Respectfully submitted this 12th day of October 2004

LAW OFFICES OF RICHARD B. JACOBSON, Ltd.



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APPENDIX

No. 02-1790

SUPREME COURT OF WISCONSIN

Steven H. Hoyme,
Petitioner-Respondent,

v.

Janice S. Brakken,
Respondent-Appellant-Petitioner.

March 10, 2004, Oral Argument

March 25, 2004, Opinion Filed

DISPOSITION:
Affirmed.

COUNSEL:
For the respondent-appellant-petitioner there were briefs by Donald R. Fraker and Fraker Law Firm, S.C., Mequon, and oral argument by Donald R. Fraker.

For the petitioner-respondent there was a brief by Janis M. Burgess and Wesley W. Hoffman & Associates, P.C., Menominee, MI, and oral argument by Janis M. Burgess.

JUDGES:
SYKES, J., did not participate. Justice JON P. WILCOX, Justice N. PATRICK CROOKS, and Justice DAVID T. PROSSER would affirm; Chief Justice SHIRLEY S.

ABRAHAMSON, Justice ANN WALSH BRADLEY, and Justice PATIENCE D. ROGGENSACK would reverse. Justice DIANE S. SYKES did not participate.

OPINION:

¶1 PER CURIAM. The court is equally divided on the question of whether the decision of the court of appeals, Hoyme v. Brakken, 668 N.W.2d 562, 266 Wis. 2d 1060, 2003 WI App 188 (Wis. Ct. App. 2003), should be affirmed or reversed. Justice JON P. WILCOX, Justice N. PATRICK CROOKS, and Justice DAVID T. PROSSER would affirm; Chief Justice SHIRLEY S. ABRAHAMSON, Justice ANN WALSH BRADLEY, and Justice PATIENCE D. ROGGENSACK would reverse. Justice DIANE S. SYKES did not participate.

¶2 Accordingly, the decision of the court of appeals is affirmed.

Appeal No. 02-1790

COURT OF APPEALS OF WISCONSIN, DISTRICT THREE

Steven H. Hoyme,
Petitioner-Respondent,

v.

Janice S. Brakken,
Respondent-Appellant.

July 22, 2003, Decided

July 22, 2003, Filed

NOTICE:
PURSUANT TO RULE 809.23 OF APPELLATE PROCEDURE, AN UNPUBLISHED OPINION IS OF NO PRECEDENTIAL VALUE AND FOR THIS REASON MAY NOT BE CITED IN ANY COURT OF THIS STATE AS PRECEDENT OR AUTHORITY EXCEPT TO SUPPORT A CLAIM OF RES JUDICATA, COLLATERAL ESTOPPEL OR LAW OF THE CASE.

DISPOSITION:
Affirmed and remanded.

JUDGES:
Before Cane, C.J., Hoover, P.J., and Peterson, J.

OPINION:

¶1 PER CURIAM. Janice Brakken appeals an order denying her motion for relief from a trial court order approving a stipulation for an injunction. Brakken argues that the trial court erred when it (1) approved the stipulation absent her understanding; (2) limited the scope of testimony on her motion for relief from the order; (3) denied her relief from the injunction; and (4) awarded Steven Hoyme attorney fees under Wis. Stat. § 814.025. Because the record supports the trial court's decision, we affirm the order. We further grant Hoyme's motion finding this appeal frivolous and remand for the circuit court to assess costs and reasonable attorney fees.

¶2 Following an evidentiary hearing before the Marinette County family court commissioner, Hoyme was granted injunctive relief restraining Brakken from contacting Hoyme in person, through a third person or in any way whatsoever. Brakken requested a de novo hearing before the circuit court. The evening before the hearing, the parties discussed settlement through their attorneys and by telephone.

¶3 The next morning, the court held a hearing at which Brakken's attorney appeared by telephone. The parties themselves did not participate; their attorneys advised the court that the parties had reached an agreement. The attorneys recited the terms on the record. The parties agreed that the injunction would remain in effect and, within thirty days, Brakken would be permitted to send Hoyme one letter without being in violation of the injunction. Other than that letter, no contact was permitted.

¶4 The court inquired whether any paperwork would be filed. Brakken's attorney stated:

> We both thought it would be wise under the circumstances to have this reduced to a written stipulation, but it's our intent the agreement be binding. I don't think Mr. Hoyme is likely to change his mind, but my client has a tendency to sometimes do that. I do have authority to enter into this agreement on her behalf.

¶5 The court responded: "It will be effective as of today, and I understand this will be followed up with a Stipulation and Order," to which both parties' counsel agreed.

¶6 Hoyme's attorney prepared a written stipulation but Brakken refused to sign it. She asserted that it did not match her understanding of what she had discussed with her attorney. Brakken claimed she notified her attorney of her objections but he did not immediately notify the court. When Brakken did not return the stipulation, Hoyme requested the court to enter an order approving it. Having heard no objection, the court signed the order. Brakken mailed Hoyme the one letter consistent with the stipulated order.

¶7 Brakken, pro se, sought relief from the order approving the stipulation. Brakken claimed the court erroneously approved the stipulation and the order should be re-opened. The court ruled that the parties' attorneys complied with Wis. Stat. § 807.05 governing stipulations but granted Brakken a hearing on whether she was entitled to relief under Wis. Stat. § 806.07.

¶8 At the hearing, the court permitted Brakken and her attorney to testify as to what took place just before the settlement agreement. Following testimony, the court ruled that Brakken had agreed to the stipulation and had authorized her attorney to enter into it on her behalf. It ruled that Brakken had failed to show grounds under Wis. Stat. § 806.07 and, therefore, that she was not entitled to relief from the stipulated order. It also determined that her defenses and motions were frivolous and awarded over $ 7,000 to Hoyme under Wis. Stat. § 814.025.

¶9 Brakken argues that the court erroneously approved the settlement on the basis of the attorneys' representations absent any testimony of the parties. We are satisfied the court was entitled to determine that the stipulation was binding under Wis. Stat. § 807.05, which provides:

> No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under s. 807.13 or 967.08 and entered in the minutes or recorded by the reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney.

The trial court, as the ultimate arbiter of weight and credibility, see Wis. Stat. § 805.17(2), rejected Brakken's testimony. The court found that her attorney was authorized to enter into the agreement on her behalf. The agreement was entered on the

record by a court reporter.[1] Therefore, the court correctly determined that it was binding under Wis. Stat. § 807.05. See also Adelmeyer v. WEPC, 135 Wis. 2d 367, 400 N.W.2d 473 (Ct. App. 1986).[2]

¶10 Brakken further contends that she repudiated the agreement before it was accepted. We reject this argument. The record discloses that the agreement was accepted in open court on the record at the April 12, 2001, hearing attended by the parties' attorneys. The record fails to support Brakken's contention that she repudiated the agreement before the April 12 hearing. To the contrary, Brakken sent Hoyme one letter, supporting a finding that she did not repudiate the agreement before it was accepted.

¶11 Next, Brakken argues that the trial court erroneously excluded proffered testimony relating to her state of mind and her claim that the injunction was overbroad. We disagree. Evidentiary issues are addressed to trial court discretion. State v. Pharr, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We uphold a trial court's evidentiary determination if the record reveals a rational basis. Id.

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[1]. Wisconsin Stat. § 807.13(4)(c) provides: "Regardless of the physical location of any party to the call, any waiver, stipulation, motion, objection, decision, order or any other action taken by the court or a party to a reported telephone hearing has the same effect as if made in open court."

[2]. Brakken cites a number of divorce cases controlled by Wis. Stat. § 767.10. We conclude these family law cases have no application in the case before us.

¶12 Brakken's argument fails to specifically identify the testimony she claims was improperly rejected. Therefore, she has not adequately preserved her claim of error. See Wis. Stat. § 901.03(1). In any event, the portions of the record that she refers to indicate that the court rejected irrelevant evidence. Here, the record reveals that the court rejected testimony of what had happened before the family court commissioner. The court reasoned that Brakken had been granted a de novo hearing and entered into a stipulation. The issue before the court was whether Brakken was entitled to relief under Wis. Stat. § 806.07. Therefore, the court ruled that what transpired before the family court commissioner and facts concerning a subpoena were irrelevant. In addition, the record shows that Brakken was allowed extensive leeway with respect to testimony about her confusion and state of mind before entering into the stipulation. Because the court's ruling has a rational basis, it is not overturned on appeal.

¶13 Brakken further argues that the court erroneously excluded hearsay testimony. The record shows that Brakken called Mickey Kucheck as a witness. Brakken explained that this witness would testify that "two times, possibly three, after I had spoken with [Brakken's attorney] in the afternoon on April 11th and into the evening I called her as well." The court held that if the witness was merely to testify to what Brakken told her, it was hearsay. Brakken argues that the court erred because the witness would have testified as to Brakken's state of mind, which falls within an exception to the hearsay rule. We do not address this argument because the record fails to indicate that Brakken raised the hearsay exception before the trial court. A party who appeals has the burden to establish "by reference to the record, that the issue was raised before the circuit court."

See State v. Caban, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

¶14 We further reject Brakken's contention that the trial court erroneously failed to accept evidence concerning the "overbreadth issue," which apparently refers to her complaint that the injunction is broader than necessary. This argument fails to adequately develop how overbreadth of the injunction is relevant to the issues before the court under Wis. Stat. § 806.07 and therefore will not be considered. See State v. Jackson, 229 Wis. 2d 328, 336-37, 600 N.W.2d 39 (Ct. App. 1999).

¶15 Next, Brakken argues that the trial court erred when it denied her relief from judgment because she established excusable neglect.[3] We disagree. Wisconsin Stat. § 806.07(1)(a) provides for relief from judgment, order or stipulation on the basis of "excusable neglect." Here, the trial court rejected Brakken's testimony on weight and credibility grounds. It accepted her attorney's testimony that Brakken had agreed to the stipulation and that he was authorized to enter into it on her behalf. Thus, the court's credibility finding was incompatible with Brakken's theory of excusable neglect and the court therefore rejected it. The trial court's credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. See Chapman v. State, 69 Wis. 2d 581, 583, 230 N.W.2d 824

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[3] Brakken apparently characterizes her confusion before entering the stipulation as excusable neglect.

(1975). Because the record demonstrates credible evidence to support the court's determination, we do not overturn it on appeal.

¶16 Interwoven in several of Brakken's arguments is her complaint that the injunction is broader than necessary. This issue exceeds the scope of our review of the court's denial of Brakken's Wis. Stat. § 806.07 motion and attempts to ask us to review the order of the family court commissioner, which is not properly before us because it is not an order of the circuit court. See Wis. Stat. § 808.03(1); see also Dane County v. C.M.B., 165 Wis. 2d 703, 708, 478 N.W.2d 385 (1992) (A court commissioner's order is not the equivalent of a final order or judgment of the circuit court.). Consequently, this argument is rejected.

¶17 Finally, Brakken argues that the trial court erroneously awarded Hoyme attorney fees under Wis. Stat. § 814.025.[4]

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[4]. Wisconsin Stat. § 814.025 provides for costs upon frivolous claims and counterclaims and reads:

> (1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> (2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or

First, she complains that the court erroneously raised the issue sua sponte and without notice. The record belies Brakken's claim. In his September 25, 2001, brief opposing Brakken's motion for relief from judgment, Hoyme requested attorney fees for having to respond to baseless motions. He characterized the legal proceedings as "without legal or factual basis." We conclude that Hoyme gave Brakken adequate notice.

¶18 Brakken further complains that the court never made a finding of frivolousness nor any findings to support its decision. We disagree. The court expressly determined that Brakken's testimony was not credible and that she authorized her attorney

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counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

to enter the stipulation. The court noted that the evidence showed Brakken had intended simply not to show up for the April 12, 2001, hearing until her attorney had pointed out the wisdom of seeking a stipulation instead.[5] The court stated:

> You just weren't going to bother to show up here. You are going to let the court come in here. You are going to let me sit down here and wait around. You are going to let [opposing counsel] have prepared for this. You will let her have whatever witnesses she had to bring in for this hearing, let them all show up, and you wouldn't show up.

The court's opinion demonstrates that it found that no factual or legal basis for Brakken's motions and that she should have known that none existed. We conclude that the court's findings adequately support the award of attorney fees under Wis. Stat. § 814.025.[6] We further conclude that Brakken's appeal is frivolous and without any factual or legal basis. Hoyme is entitled to attorney fees on appeal pursuant to Wis. Stat. § 809.25. We remand for the circuit court to assess costs and reasonable attorney fees.

By the Court.—Order affirmed and cause remanded with

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[5]. Brakken faxed a note to her attorney stating: "We had left it that they would believe we would show [and] wouldn't. As you said, it would incur extra [money] on their behalf." The trial court was entitled to infer that Brakken's objective was to drive up Hoyme's attorney fees.

[6]. The amount of fees awarded is not challenged.

directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

Case No. 00-CV-205

CIRCUIT COURT, MARINETTE COUNTY, WISCONSIN

Steven H. Hoyme,
Petitioner,

v.

Janice S. Brakken,
Respondent.

August 29, 2000, Ordered

THE COURT FINDS THAT:

1. The petitioner has filed a petition alleging harassment.
2. The petitioner has served upon the respondent a copy of the temporary restraining order and notice of the time for a hearing on the issuance of the injunction. The respondent had an opportunity to be heard. This court has personal and subject matter jurisdiction.
3. There are reasonable grounds to believe that the respondent has violated § 947.013, Wisconsin Statutes.
4. There is not clear and convincing evidence that the respondent may use a firearm to cause physical harm to another or to endanger public safety.

IT IS ORDERED THAT an injunction be entered against the respondent and the respondent be enjoined and restrained from: Contacting Petitioner by telephone, letter, fax, telegram, computer, in person, through a third party, or any way whatsoever; entering upon any property owed, leased or rented

by Petitioner, from which Petitioner conducts his business, or at which Petitioner resides, whether temporarily or more permanently. Respondent may not come into contact with Petitioner in any public place. If either Respondent or Petitioner arrives at a public place and discovers that the other is present, the last to arrive must leave immediately.

THIS INJUNCTION SHALL BE EFFECTIVE UNTIL August 27, 2002.

Violation of this order shall result in immediate arrest and is punishable by imprisonment not to exceed 90 days or a fine not to exceed $1,000, or both, and payment of filing and service fees.

This injunction is entitled to full faith and credit in every civil or criminal court of the United States or any other state, or Indian tribal courts (to the extent such tribal courts have personal jurisdiction over non tribal members).

BY THE COURT:

s/Hon. Francis M. Boyle, Jr.
August 29, 2000

Case No. 00-CV-205

CIRCUIT COURT, MARINETTE COUNTY, WISCONSIN, BRANCH 1

Steven H. Hoyme,
Petitioner,

v.

Janice S. Brakken,
Respondent.

May 15, 2001, Ordered and Filed

COUNSEL:
For the Petitioner, Janis M. Burgess and Wesley W. Hoffman & Associates, P.C.
For the Respondent, Richard J. Auerbach and Auerbach & Porter.

JUDGE:
Before David G. Miron, J.

ORDER:

This matter having come before the Court, the Honorable David G. Miron presiding, on April 12, 2001, the time set for hearing on RESPONDENT BRAKKEN'S request for a De Novo hearing, PETITIONER appearing through his attorney, Janis M. Burgess, and RESPONDENT appearing through her attorney, Richard J. Auerbach, via telephone; the parties having placed a Stipulation on the record in full

resolution of this matter, and the Court being otherwise fully advised in this regard;

IT IS HEREBY ORDERED that RESPONDENT'S request for a De Novo hearing in the captioned matter is waived.

IT IS FURTHER ORDERED that the Injunction previously granted by Commissioner Boyle in this matter, dated August 29, 2000, continues in full force and effect with the sole following exception, which permits RESPONDENT to send one (1) letter, enclosed in a single envelope, to PETITIONER STEVEN H. HOYME, at his home address. This correspondence shall be sent by certified mail, and must be postmarked no later than May 12, 2001. This is the only exception to the injunction currently in place that is permitted. Any other attempts to contact Dr. Hoyme by Ms. Brakken shall be considered a violation of that injunction.

IT IS FURTHER EXPRESSLY ORDERED that, each party is bound by the terms of this Order, in conformity with the Stipulation which was placed on the record in open Court on April 12, 2001. The terms of this Order take immediate effect as of April 12, 2001, the date of placing the Stipulation on the record in open Court, regardless of the date upon which a final Order shall be entered by the Court.

BY THE COURT:

s/Honorable David G. Miron
Circuit Court Judge

Dated: May 15, 2001

Case No. 00-CV-205

CIRCUIT COURT, MARINETTE COUNTY, WISCONSIN

STEVEN H. HOYME,
Petitioner

v.

JANICE BRAKKEN
Respondent

January 26, 2001, Filed

RESPONSE TO PETITIONER'S OBJECTION TO REQUEST FOR *DE NOVO* HEARING

INTRODUCTION

Petitioner's counsel raises two objections to Respondent's request for a de novo hearing. First, she asserts that there is no assertion by Respondent of any basis for a de novo hearing; second, she asserts that it is not timely. Neither assertion has merit.

I. A REQUEST FOR DE NOVO HEARING DOES NOT NEED TO CONTAIN ASSIGNMENTS OF ERROR.

...

II. IF IT IS NECESSARY TO ASSIGN ERROR, THE APPROPRIATE REMEDY WOULD BE TO REQUIRE A MORE SPECIFIC STATEMENT, NOT DISMISSAL.

If some particularized showing of commissioner error is required, the remedy is not to dismiss the request but to permit its supplementation. Respondent will have no difficulty showing that the Commissioner's order was in error. As a single example, I note the following:

1. Harassment injunctions must adhere to statutory provisions.

2. Pursuant to §813.125(4)(a), Stats., a court is empowered in harassment injunction cases to order the respondent to "cease or avoid the harassment of another person." No provision exists in §813.125, Stats., regarding avoidance of the person's residence, prohibiting all contacts, etc.

3. This lack of specific provisions is significant because other injunction actions in Chapter 813 expressly provide for such restrictions. For example, §813.12(4)(a), Stats., provides in domestic abuse cases that the court is empowered to order the respondent "to refrain from committing acts of domestic abuse..., to avoid the petitioner's residence,...or any premises temporarily occupied by the petitioner,...to avoid contacting or causing any person other than a party's attorney contact the petitioner,... or any combination of these remedies..." Similarly, §813.122(5)(a), Stats., provides in child abuse injunctions that a court has the authority to prohibit contact with a child's residence and with the child, directly or indirectly.

4. The present injunction purports to prohibit Respondent from going upon Petitioner's property and from having contact with him whatsoever, even contact that is non-harassing.

5. The order was *ultra vires*.

Accordingly, if a particular assignment of error is required (and it clearly is not as discussed above), Respondent should be given the opportunity to supplement her request.

III. RESPONDENT'S REQUEST FOR A DE NOVO HEARING IS TIMELY.

...

Dated this 22nd day of January, 2001.

AUERBACH & PORTER
s/Richard J. Auerbach
Attorney for Respondent

222 South Hamilton Street, Suite 23
Madison, Wisconsin 53703
Telephone Number: (608) 256-0909
State Bar Number: 1008842

Case No. 00-CV-205

CIRCUIT COURT, MARINETTE COUNTY, WISCONSIN

Steven H. Hoyme,
Petitioner,

v.

Janice S. Brakken,
Respondent.

February 23, 2001, Stipulation

COUNSEL:
For the Petitioner, Janis M. Burgess and Wesley W. Hoffman & Associates, P.C.
For the Respondent, Richard J. Auerbach and Auerbach & Porter.

JUDGE:
Before David G. Miron, J.

RECORD:

THE COURT: Let's call the case Steven H. Hoyme versus Janice S. Brakken. This is Case Number 00-CV-205. Neither of the parties appear in person, but Mr. Hoyme appears by his attorney, Janice [sic] Burgess, and Miss Brakken appears by her attorney, Richard Auerbach. This was scheduled today as a status conference and a hearing on the request for de novo hearing.

Just to kind of set the stage here, I looked through the file. I haven't read everything in here, but I've read the bulk of the materials. I haven't looked at the exhibits or anything, but it appears to me that Court Commissioner Francis M. Boyle, Junior, issued an injunction on August 29, 2000. On November 21, 2000, Miss Brakken attempted to appeal that decision to the Court of Appeals. That appeal was dismissed because the Court of Appeals did not have jurisdiction. They issued an order on December 19, 2000, which was received here at the Marinette Clerk of Courts Office on December 21, 2000, and on December 22, 2000, Ms. Brakken filed a request for a de novo hearing.

Is that accurate, Mr. Auerbach?

MR. AUERBACH: I believe so, your Honor. Yes, it is.

THE COURT: Miss Burgess?

MISS BURGESS: I believe so, your Honor, yes.

THE COURT: Now there has been an objection to the request for de novo hearing filed on behalf of Mr. Hoyme, and there has been a response to that objection filed on behalf of Miss Brakken. Mr. Auerbach, why don't you go first since your client is looking for the hearing.

...

THE COURT: ...For those reasons I will allow a de novo hearing in this case. Obviously the injunction that is in place will remain in place, in full force and effect until – at least up

until the date of this hearing and perhaps that.

I know that there was some mention in Mr. Auerbach's brief regarding the language of the – of the injunction, and I want you to take a look at the case In The Paternity of C.A.S. and C.D.S. found at 185 Wis. 2d 468. And I think that case gives authority for the breadth of the order that the court commissioner entered. So you probably want to take a look at that before we get back here.

MR. AUERBACH: Judge, actually I disagree with your opinion that it gives the court commissioner that authority. I assure you I am familiar with the case. If you look at who was doing the briefing, I was one of the attorneys in that case.

THE COURT: Okay.

MR. AUERBACH: We can address that further if there is a granting of the injunction at all. I do think that case is an interesting one.

THE COURT: Yes. Okay. When are we going to schedule this?

...

THE COURT: ... We will have this hearing on April 12th at 9:00 a.m.

MR. AUERBACH: Thank you, Judge.

Case No. 00-CV-205

CIRCUIT COURT, MARINETTE COUNTY, WISCONSIN

Steven H. Hoyme,
Petitioner

v.

Janice S. Brakken,
Respondent.

August 28, 2001

RESPONDENT'S BRIEF IN SUPPORT FOR MOTION AND MOTION TO VACATE JUDGMENT/ORDER.

Janice S. Brakken
Pro se

RESPONDENT Janice S. Brakken submits this brief in support of the motion to vacate the judgement or order based on fraud, misrepresentation, surprise, newly discovered evidence, and stipulation entered under duress.

FACTS AND ARGUMENT

The issuance of the harassment injunction by the court commissioner was not substantiated by the statute, the model penal code, applicable and relevant Supreme Court decisions, and Constitutional rights to due process, representation by counsel, equal protection of the law, free speech, and

association.

1. THE PETITION WAS DEFECTIVE.

...

2. THE PETITION WAS CONSTRUCTIVE FRAUD.

...

3. THE PETITIONER WAS DENIED THE CONSTITUTIONAL RIGHT TO DUE PROCESS, REPRESENTATION OF COUNSEL, AND EQUAL PROTECTION UNDER THE LAW.

...

4. CONDUCT DID NOT MEET STATUTORY REQUIREMENTS FOR HARASSMENT

...

4.[sic] THE INJUNCTION IS DEFECTIVE.

Respondent has proven that the requirements of establishment of intent and legitimacy of purpose warranted denial of the petition for an injunction, and the order should now be vacated. The language of the injunction when issued was overboard. In Bachowski the judge restrained Salamone fron "harassing petitioner, having any contact with petitioner or coming upon petitioner's premises." Bachowski states:

"Only the acts or conduct which are proven at trial and form the basis of the judge's finding of harassment or substantially similar conduct should be enjoined.... We conclude the injunction is drafted too broadly and is therefore invalid."

The commissioner did not have reasonable grounds to believe that the respondent engaged in the conduct proscribed by sec. 947.013 (1) (b). In City of Milwaukee v. Wilson, supra, at p. 19 "in order to assert a claim of Constitutional overbreadth, it is not necessary that the conduct of the respondent is constitutionally protected." The respondent was enjoined from having any contact with the petitioner for two years:

"by telephone, letter, fax, telegram, computer, in person, through third party, or any way whatsoever; entering upon any property owned, leased or rented by the Petitioner, from which petitioner conducts his business, or at which the petitioner resides, whether temporarily or more permanently. Respondent may not come into contact with petitioner in any public place. If either respondent or petitioner arrives at a public place and discovers that the other is present, the last to arrive must leave immediately."

...

s/ Janice S. Brakken
Pro Se
306 Llamberris Pass
Wales, WI 53183

October 31, 2001

Ms. Janis M. Burgess
Attorney at Law
949 First Street
Menominee, MI 49858

Ms. Janice S. Brakken
306 Llamberris Pass
Wales, WI 53183

RE: Hoyme v. Brakken, Case No. 00-CV-205

Dear Ms. Burgess and Ms. Brakken:

I have now had a [sic] opportunity to review all of the recent filings in this matter. It appears to me that Ms. Brakken raises 5 issues.

#1. She moves to change venue. I have reviewed Wis. Stats. Sec. 801.50(5s). It would appear to me that venue is properly situated in Marinette County. This statute state [sic], "Venue of an action under Sec. 813.122 or 813.125 shall be in the county in which the cause of action arose or where the petitioner or the respondent resides." This is a petition under Sec. 813.125. Furthermore, it is my understanding that Mr. Hoyme resides in this county and the cause of action arose in this county. In addtion, it appears to me that this motion is untimely since not only has a hearing been held before a Marinette County court commissioner, but this matter was scheduled to be heard by me in April, 2001.

#2. Motion to substitute judge. Pursuant to Wis. Stats. Sec. 801.58(1), this request is untimely.

#3. Motion for summary judgment. This motion is not appropriate. This case has proceeded to the position of taking testimony at the court commissioner's hearing and a de novo hearing was granted. This case is past the time frame for motion for summary judgment.

#4. Motion to vacate judgment. Based on Wis. Stats. Sec. 807.03 and/or Sec. 807.05. Apparently Ms. Brakken is attempting to claim pursuant to Sec. 807.05, that the agreement entered on April 12, 2001 is not valid. However, Wis. Stats. Sec. 807.05 states, "no agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court....and entered in the minutes or recorded by the reporter...." The judicial counsel note indicates that the statute is amended to reflect that stipulations entered into at telephone confereces are no less binding that those made in writing or in court.

My recollection of the incident on April 12, 2001, is bolstered by the transcript of the court hearing which occurred on April 12, 2001. I enclose a copy of this for your review. This was a stipulation that was entered in court and has been recorded by the court reporter.

Therefore, I believe this motion lacks any merit.

#5. Finally, Ms. Brakken requests relief from judgment pursuant to Sec. 806.07. The burden is on her to establish that

her situation falls within one of the paragraphs listed under Sec. 806.07(1).

Therefore, we will hold a hearing with respect to this issue on Thursday, December 27, 2001 at 3:00 p.m.

Sincerely,
s/David G. Miron
Circuit Judge

Case No. 00-CV-205

CIRCUIT COURT, MARINETTE COUNTY, WISCONSIN, BRANCH 1

Steven H. Hoyme,
Petitioner,

v.

Janice S. Brakken,
Respondent.

April 8, 2002, Ordered and Filed

COUNSEL:
For the Petitioner, Janis M. Burgess and Wesley W. Hoffman & Associates, P.C.
For the Respondent, Janice S. Brakken, In Pro Per.

JUDGE:
Before David G. Miron, J.

ORDER:

This matter having come before the Court, the Honorable David G. Miron presiding, on March 20, 2002, the time set for hearing on RESPONDENT BRAKKEN'S Motion for Relief from Judgment or Order 806.07, PETITIONER appearing through his attorney, Janis M. Burgess, and RESPONDENT appearing on her own behalf, the parties having previously filed briefs in support of their positions, testimony and exhibits having been presented to the Court at

this hearing, and the Court being otherwise fully advised in this regard:

IT IS HEREBY ORDERED that RESPONDENT'S Motion for Relief from Judgment or Order, pursuant to Wis. Stat. 806.07 is hereby DENIED, for the reasons taht the requirements of such an order under Wis. Stat. 806.07(1)(1) through (h) have not been established.

This Court further finds that RESPONDENT'S Motion was frivolous and lacking any factual support. Therefore, PETITIONER HOYME'S request for actual attorneys fees incurred in responding hereto, as requested in its brief in opposition to RESPONDENT'S motion, dated September 25, 2001, is hereby granted.

As the attached summary of relevant fees indicates, this Court finds that PETITIONER'S actual attorneys in responding to RESPONDENT'S Motion for Relief from Judgment or Order, from August 2001 through March 20, 2002, totaled thirty-eight and twenty-five hundredths (38.25) hours. This Court further finds that counsel's hourly rate of One Hundred Eighty-five Dollars ($185.00) per hour is reasonable and appropriate. Accordingly, RESPONDENT is ordered to pay PETITIONER, STEVEN H. HOYME, Seven Thousand Seventy-six and twenty-five hundredths Dollars ($7,076.25) as his actual attorneys fees incurred as a result of the RESPONDENT'S Motion for Relief from Judgment. IN light of the existing injunction which prohibits RESPONDENT from communicating in any fashion with PETITIONER, RESPONDENT is expressly ordered to satisfy this Order by forwarding the full amount thereof to PETITIONER STEVEN

H. HOYME in care of attorney, Wesley W. Hoffman and Associates, P.C., 949 First Street, Menominee, MI 49858.

It is so ordered this 8th day of April, 2002.

BY THE COURT:
s/ David G. Miron
Circuit Court Judge

Case No. 00-CV-205

CIRCUIT COURT, MARINETTE COUNTY, WISCONSIN

Steven H. Hoyme,
Petitioner,

v.

Janice S. Brakken
Respondent.

July 24, 2002, Filed

ORDER DENYING REQUEST FOR RECONSIDERATION

On or about July 5, 2002, Respondent, Janice S. Brakken filed with Marinette County Clerk of Courts office, "Respondent's Motion for Relief from Order and Judgment 806.07, and Motion to Stay Order in Judgment Pending 806.07 Hearing and/or Appeal."

It is clear from the text of Respondent's most recent motion that she is asking for reconsideration for the Court's decision as a result of the hearing held in this matter on March 20, 2002.

The Respondent has presented no new information which would justify a change in the Court's judgment and order.

THEREFORE, IT IS HEREBY ORDERED that Respondent's motions filed July 5, 2002 are hereby summarily denied.

Dated this 24th day of July, 2002

/s David G. Miron
Circuit Court Judge